Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies;	)	WT Docket No. 16-421
	)	
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

COMMENTS OF THE FIBER TO THE HOME COUNCIL AMERICAS ON THE MOBILITIE, LLC, PETITION FOR DECLARATORY RULING

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The Fiber to the Home Council Americas ("FTTH Council" or "Council")[1] hereby submits its comments in response to the Mobilitie, LLC Petition for Declaratory Ruling ("Mobilitie Petition")[2] and the Federal Communications Commission's ("Commission's") corresponding Public Notice.[3] These comments focus specifically on the proper interpretation of Section 253 of the Communications Act of 1934, as amended (the "Act") to achieve the

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1 The FTTH Council's mission is to accelerate deployment of all-fiber access networks by demonstrating how fiber-enabled applications and solutions create value for service providers and their customers, promote economic development, and enhance quality of life. The FTTH Council's members represent all areas of the broadband access industry, including telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities, and municipalities. As of today, the FTTH Council has more than 250 entities as members. A complete list of FTTH Council members can be found on the organization's website: http://www.ftthcouncil.org.

2 *See* Petition for Declaratory Ruling, Mobilitie, LLC, WT Docket No. 16-421 (filed Nov. 15, 2016).

3 *See Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, Public Notice, DA 16-1427 (rel. Dec. 22, 2016) ("Public Notice").

important national objectives of facilitating infrastructure deployment and promoting broadband and advanced services competition.[4]

INTRODUCTION AND SUMMARY

Congress adopted Section 253 to remove barriers to entry and as a fundamental element of the market-opening provisions of the Telecommunications Act of 1996. The core directive in the provision is that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[5] Congress acknowledged, however, the legitimate role of the States in overseeing certain activities related to the deployment of telecommunications infrastructure and services, and as such included additional provisions in the statute to preserve that role subject to the overarching objective of the section of removing barriers to entry.[6] The Commission has long understood the objective and value of Section 253, explaining that, rather than regulatory fiat, "Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers, and by preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals."[7] More recently, Chairman Pai, as part of his Digital Empowerment Agenda introduced last fall while he was still a Commissioner, offered renewed support for using Section 253 to remove barriers to network deployment:

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4 *See* 47 U.S.C. § 253.

5 *Id*. § 253(a).

6 *See id*. § 253(b), (c).

7 *Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13096 (1996).

> [W]here states or localities are imposing fees that are not 'fair and reasonable' for access to local rights of way, the FCC should preempt them. Where local ordinances erect barriers to broadband deployment (especially as applied to new entrants), the FCC should eliminate them. And where local governments are not transparent about their application processes, the FCC should require some sunlight. These processes need to be public and streamlined.[8]

Members of the Council, including service providers, equipment vendors, and fiber construction contractors, all believe — and have demonstrated — that access to public rights-of-way ("PROW") on reasonable, non-discriminatory terms is critical to the deployment of 5G and other advanced telecommunications services.[9] They concur with Mobilitie that "[r]eaping the promise of wireless broadband and now 5G requires massive investments in cell sites, backhaul, and transport facilities, as well as access to rights of way for building that infrastructure."[10] Unfortunately, too often, state and local governments, seeking to leverage their control over PROW and other government controlled infrastructure, have imposed significant roadblocks to broadband and telecommunications network deployments.

Therefore, the Commission should, in its role as the prime interpreter of the Act, provide guidance as to what practices by state and local authorities "prohibit or have the effect of

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8 *See* Remarks of FCC Commissioner Ajit Pai at the Brandery, "A Digital Empowerment Agenda" (Sept. 13, 2016) ("Pai Digital Empowerment Remarks"). *See also* FCC Commissioner Michael O'Rielly, Statement Before the Senate Committee on Commerce, Science, and Transportation, "Oversight of the Federal Communications Commission," at 1-2 (Sept. 15, 2016) ("At some point, the Commission may need to exert authority provided by Congress to preempt the activities of those delaying 5G deployment without justifiable reasons.").

9 The Commission acknowledged in the Public Notice that "next generation services [such as 5G] have the potential to revolutionize the mobile wireless experience." Public Notice at 3.

10 Mobilitie Petition at 5.

prohibiting" the provision of telecommunications services in violation of Section 253(a). It also should clarify the scope of state and local authority to manage PROW, as articulated in Section 253(c), and that state and local actions under each of the elements of Section 253(c) are tightly circumscribed. Finally, the Council urges the Commission to make clear that entities that seek to access PROW may bring an action under Section 253(c) when state and local regulators' management activities or compensation requirements exceed the scope of Section 253(c). By setting forth clear "rules of the road," the Commission will facilitate smooth rollouts of telecommunications infrastructure and services across the nation going forward.[11]

I. THE PROVISIONS IN SECTION 253 ARE AMBIGUOUS AND HAVE BEEN INTERPRETED INCONSISTENTLY

The general mandate under Section 253(a) is that state and local regulations cannot "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[12] At the same time, Congress acknowledged a legitimate oversight role for state and local authorities by permitting States and local governments to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[13]

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11 Indeed, the Commission has long acknowledged the need for "guidelines for public rights-of-way policies that will ensure that best practices from state and local government are applied nationally." *See* Federal Communications Commission, Connecting America: The National Broadband Plan, at ch. 6 (2010).

12 47 U.S.C. § 253(a).

13 *Id*. § 253(c). Section 253 also allows States and local governments to "impose, on a competitively neutral basis … requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." *Id*. § 253(b).

Portions of Sections 253(a) and 253(c) are ambiguous. For instance, what does it mean for a regulation to "have the effect of prohibiting the ability of any entity" to provide service? What activities and regulations are within the scope of managing PROW? What is "fair and reasonable compensation"? When is compensation "competitively neutral and nondiscriminatory" if incumbents operate under decades-old franchises while new entrants pay compensation under a different methodology? What does it mean for compensation requirements to be "publicly disclosed" by the state or local government? Absent Commission guidance on these issues and in light of inconsistent case law across the nation, some state and local governments have adopted regulations that result in significant roadblocks to broadband and telecommunications services deployment. Because access to PROW is critical to the deployment of telecommunications infrastructure, including that which will support 5G and other advanced telecommunications services, the time is ripe for the Commission to provide guidance as to the proper interpretation of these provisions, consistent with the underlying objective of Section 253, and the pro-competition goals of the Telecommunications Act of 1996.

II. THE COMMISSION SHOULD INTERPRET THE PHRASE "PROHIBIT OR HAVE THE EFFECT OF PROHIBITING" IN SECTION 253(a) CONSISTENT WITH THE PURPOSES OF THE STATUTE

The general mandate under Section 253(a) is that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[14] The Commission has previously stated that practices that clearly "prohibit" the provision of telecommunications services, such as regulations that on their face "prohibit all but

[14] 47 U.S.C. § 253(a).

one entity from providing telecommunications services in a particular State or locality" are not permissible under Section 253(a).[15] However, as acknowledged in the Public Notice, the Commission has not otherwise commented on the boundaries of this term.

Meanwhile, over the past two decades, in the absence of the Commission's full interpretation of the statute, there have been inconsistent interpretations of the statute across the federal court system.[16] The Eighth and Ninth Circuits, for instance, have required a Section 253(a) claim to demonstrate in effect that there has been an outright prohibition of the provision of service.[17] For example, in *Sprint Telephony*, the Ninth Circuit held that an ordinance that, among other things, established numerous zoning restrictions, required an onerous application process for access to PROW (including hearings), and allowed the decision-maker discretionary authority to deny or conditionally grant an application, did not violate Section 253(a).[18] By contrast, other circuits have established elements in Section 253(a) cases that do not require the regulation to effect an outright prohibition.[19] For instance, the Tenth Circuit in one case found

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15 *Classic Telephone, Inc.*, 11 FCC Rcd at 13095.

16 *See* Public Notice at 10-11.

17 *See Sprint Telephony PCS, LP v. San Diego County*, 543 F.3d 571, 579-81 (9th Cir. 2008) (en banc) (*overruling City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001)) (holding that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."). *See also Level 3 Commc'ns, L.L.C. v. City of St. Louis, Missouri*, 477 F.3d 528, 533 (8th Cir. 2007) (A plaintiff suing a city under Section 253(a) of the Act, which bars state or local requirements that "may prohibit or have the effect of prohibiting" the provision of telecommunications service, must show actual or effective prohibition, rather than the mere possibility of prohibition. This need not be a complete or insurmountable prohibition, but "an existing material interference with the ability to compete in a fair and balanced market.").

18 *See Sprint Telephony*, 543 F.3d at 578.

19 *See Puerto Rico Tele. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (A prohibition does not need to be complete or insurmountable to run afoul of Section 253(a), and a regulation need not erect an absolute barrier to entry in order to be

that the combined effect of a local ordinance which required a detailed application, registration fee, and installation of excess capacity on underground conduit for the city's use violated Section 253(a).[20]

Although inquiries into state and local ordinances must necessarily be fact-specific, the application of disparate preemption standards by different courts can substantially frustrate a provider's attempts to build out new infrastructure to support telecommunications services. Further, differing interpretations by circuit courts in different areas of the country could undermine national broadband deployment goals and the construction of robust infrastructure and networks. Thus, the Commission should more clearly delineate the types of activities that would violation Section 253(a).

While a hard and fast interpretation that anticipates all scenarios with specificity is not possible, or even desirable, as flexibility to address novel situations is prudent, the Commission can and should set forth clear guidelines articulating how to assess whether a particular type of state or local government action prohibits or has the effect of prohibiting the provision of an interstate or intrastate telecommunications service so as to constitute a violation of Section 253(a). Those guidelines should, at a minimum, make clear that Section 253(a) would proscribe not only facial prohibitions to provide service, but any regulation or requirement that (1) would

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found prohibitive). *See also BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1186-87 (11th Cir. 2001) (Section 253(a) of the Communications Act, which prohibits state and local governments from passing laws that may prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications service, imposes substantive limitations on state and local government regulation of telecommunications).

20 *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004) (finding that "substantial increase in costs imposed by the excess conduit requirements and the appraisal-based rent that in themselves renders those provisions prohibitive, not the additional cost-based application and registration fees").

impose conditions, obligations, or restrictions on a provider, either prior to the initiation of service, as part of its ongoing obligations, or as part of a planned expansion of service, that would "substantial[ly] increase" the provider's costs such that the business case no longer supports the provision or expansion of service [21] or (2) allows the authority substantial discretion in the approval process.[22]

Regarding what elements constitute a Section 253(a) claim, the Council submits that interpretation adopted by the First and Eleventh Circuits better serves the objectives of the statute and should inform the Commission's guidance. Namely, allowing states to enact and enforce excessive regulations related to access to PROW, even those that do not impose an outright prohibition of service, would undermine Congress's express intent to allow "competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers." Rather, the Commission should find that, when challenging a particular practice or regulation under Section 253(a), a carrier should only be required to provide evidence that the government's denial differs from standard commercial practices for access to private right of way, both in terms of costs and timing, at which point the burden shifts to the government to demonstrate the carrier, if subject to and complying with the statute, regulation, or requirement, could nonetheless offer service on a technically and economically viable basis.

The Council submits clarifying the proper interpretation of Section 253(a) in this way would ensure that the intended purpose of Section 253 – namely, removing barriers to entry for

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21 *See Level 3 Commc'ns*, 477 F.3d at 533.

22 *See Bell Atlantic-Maryland, Inc. v. Prince George's Cnty., Maryland*, 49 F. Supp. 2d 805 (D. Md. 1999) (vacated on other grounds, *Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 212 F.3d 863 (4th Cir. 2000)) (finding that a county's "decision to grant or deny a franchise may not be left to the county's ultimate discretion").

telecommunications service – would be best served. As parties begin to plan for massive infrastructure deployments to support 5G and other advanced services, a consistent, nationwide interpretation is needed to provide certainty. The interpretation urged above would provide clarity to providers, state and local authorities, and courts as to what is and is not permissible and the elements of a claim in a Section 253(a) dispute, thereby eliminating certain barriers that might be erected, and promoting more rapid deployment.

III. THE COMMISSION SHOULD PROVIDE CLARIFICATION ON THE PROPER INTERPRETATION OF THE ELEMENTS OF SECTION 253(C)

Section 253(c) includes four elements that merit the Commission's interpretation so as to promote the purpose of Section 253. The statute recognizes that while state and local authorities are permitted "to manage the public rights-of-way," how and what they can manage is subject to certain important limits under Section 253(c). Any compensation required from telecommunications providers for PROW access must be "fair and reasonable" and assessed "on a competitively neutral and nondiscriminatory basis." Regulation of the access to and use of PROW must be "on a nondiscriminatory basis." And any compensation required for access to PROW must be "publicly disclosed by [the state or local] government."[23]

Unfortunately, some state and local governments have run afoul of a rational interpretation of Section 253(c) and adopted regulations that result in significant roadblocks to broadband and telecommunications services deployment, contrary to the intended purpose of Section 253. The Commission should provide clarification on the proper interpretation of each of these elements so that states, local authorities, and providers all have a clear understanding of what the primary bounds of permissible actions and regulations in managing PROW are.

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[23] 47 U.S.C. § 253(c).

A. Management Activities Should Be Limited to Governing the Physical Alteration, Occupation, and Restoration of PROW in Order to Be Deemed "Reasonable"

The Commission should clarify that a state or local government's management activities must be limited to governing the physical alteration, occupation, and restoration of PROW in order to fall within the scope of Section 253(c). Such a declaration would be consistent with the Commission's previous interpretations of permissible management[24] as well as limitations on management functions as interpreted by many courts.[25] To ensure maximum effectiveness of

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[24] *See Classic Telephone, Inc.*, 11 FCC Rcd at 13103-04 (1996), quoting 141 Cong. Rec. S8172 (June 12, 1995) (statement of Sen. Feinstein) ("During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under section 253(c), including State and local legal requirements that: 'regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts'; 'require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies'; 'require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation'; 'enforce local zoning regulations'; and 'require a company to indemnify the City against any claims of injury arising from the company's excavation.'"); *See also TCI Cablevision of Oakland Cnty., Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21442 (¶ 103) (1997). (finding that permissible activities under section 253(c) "include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.").

[25] *See Bell Atlantic-Maryland, Inc. v. Prince George's Cnty., Maryland*, 49 F. Supp. 2d 805 (D. Md. 1999) (vacated on other grounds, *Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 212 F.3d 863 (4th Cir. 2000)) (finding that under Section 253(c), the terms of any county-issued franchise must be limited to the narrow scope of activities relating to the physical alteration, occupation, and restoration of PROW. In addition, a county's "decision to grant or deny a franchise may not be left to the county's ultimate discretion, but rather may only be conditioned on the telecommunication company's agreement to comply with the County's reasonable regulations for managing the use of its rights-of-way."); *see also City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1178 (9th Cir. 2001) (vacated on other grounds, *Sprint Telephony*, 543 F.3d 571) (finding that city ordinances that attempted to "regulate the telecommunications companies themselves, not merely the rights-of-way" violated section 253(c)).

this clarification, the Commission should, in the event of a dispute, continue to uphold its policy of requiring a state or local authority to state with specificity how its requirements relate to the management of access to and use of its PROW.[26]

The FCC should, as part of its interpretation of "reasonable" management practices, consider adopting a "shot clock" for state and local authorities to review and issue decisions on applications for access to PROW[27] similar to the shot clock adopted for Section 621 local franchise applications in 2007[28] or for Section 332 siting applications in 2009.[29] In establishing

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26 *See Classic Telephone, Inc.*, 11 FCC Rcd at 13104 (1996) ("[C]onclusory statements are inadequate to establish that [a state or local authority's] actions reflect an exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights-of-way.").

27 Alternatively, the Commission could adopt a shot clock on the basis that a lack of a timetable for reviewing PROW access applications has the effect of prohibiting the provision of telecommunications services in violation of Section 253(a). *See TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) ("the extensive delays in processing TCG's request for a franchise have prohibited TCG from providing service for the duration of the delays").

28 *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶¶ 70, 72 (2006) (finding that "90 days provides [local franchise authorities (LFAs)] ample time to review and negotiate a franchise agreement with applicants that have access to rights-of-way" and "[f]or other applicants, … six months affords a reasonable amount of time to negotiate with an entity that is not already authorized to occupy the right-of-way, as an LFA will need to evaluate the entity's legal, financial, and technical capabilities in addition to generally considering the applicant's fitness to be a communications provider over the rights-of-way") ("2007 Local Franchising Order").

29 *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994, ¶ 32 (2009) (finding "that a 'reasonable period of time' is, presumptively, 90 days to process personal wireless service facility siting applications requesting collocations, and, also presumptively, 150 days to process all other applications.") ("2009 Declaratory Ruling").

these time limitations, the Commission found that state or local application review processes were resulting in "unreasonable delays" in the deployment of cable and wireless services, respectively,[30] thereby undermining the competitive objectives of Section 621 and Section 332.[31] The Commission therefore determined that a declaratory ruling was needed to "provide guidance, remove uncertainty and encourage the expeditious deployment of wireless broadband services."[32] The Council submits that similar circumstances exist for PROW access requests reviewed by state and local authorities under Section 253, and as such it would be appropriate for the Commission to adopt a shot clock provision for such applications. The Commission could declare, for example, that if a state or local authority fails to act on an application for access to PROW within 90 days where the municipality previously has granted access to PROW to the applicant, or 6 months for initial applicants (who do not have a franchise), then an application will be deemed granted. This will ensure that state or local regulatory action, or inaction in this case, stemming out a requirement to obtain approval for PROW access does not undermine competition where the delay hampers the ability of new entry or expansion of service areas where other providers are already offering service. Delays in access can lead to lost customers, which is not competitively neutral. Consistent with the Commission's 2014 declaratory ruling regarding review of wireless siting applications, the shot clock should start running from the date

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30 *2007 Local Franchise Order*, ¶ 22; *2009 Declaratory Ruling*, ¶ 32.

31 *See 2007 Local Franchise Order*, ¶ 68 (concluding that "without a defined time limit, the extended delays will continue, depriving consumers of cable competition"; *2009 Declaratory Ruling*, ¶ 35 (finding that "[s]tate and local practices that unreasonably delay the siting of personal wireless service facilities … impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996").

32 *Id.*, ¶ 32.

the application is first submitted, not when the reviewing authority declares the application complete.[33] Additionally, the reviewing authority should not be able to avoid a section 253 shot-clock by enacting a moratorium on reviewing PROW access applications.[34]

B. The Commission Should Interpret "Fair and Reasonable Compensation" to Allow Fees or Other Compensation Only If They Are Directly Related to the Actual Costs of Supervisory Functions in Managing a Provider's Use of PROW and the Cost of Maintaining the Portion of PROW Used By the Provider

The Mobilitie Petition includes a request for the Commission to "declare that the phrase 'fair and reasonable compensation' means charges that enable a locality to recoup its reasonable costs to issue and review permits and manage its rights of way, and that additional charges are unlawful."[35] The Council generally supports the request for clarification, but submits that the scope of what is permissible under this clause should be tailored. Specifically, the Commission should declare that "fair and reasonable compensation" requires that the fees imposed on providers by a state or local government must be directly related to the actual costs of supervisory functions in managing a provider's use of PROW and the actual costs of performing those functions and maintaining the portion of PROW used by the provider. This interpretation would send a clear message to state and local authorities that attempts to use the compensation clause of Section 253(c) to either slow the deployment of telecommunications services or as a means of generating revenue or extracting additional unrelated benefits, such as gifts of free fiber

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33 *See Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies et al.*, WT Docket No. 13-238 et al., Report and Order, 29 FCC Rcd 12865, ¶ 258 (2014).

34 *See id*. Such moratoria on their face violate Section 253(a) under any interpretation of that subsection.

35 Mobilitie Petition at 24.

or service along certain routes will be subject to preemption by the Commission and should not be tolerated by the courts.

The Council's requested clarification is consistent with long-standing Commission policy regarding Section 253(c). For instance, more than two decades ago, in discussing the compensation provisions of Section 253(c), the Commission explained that state and local authorities were permitted to recover from telecommunications carriers utilizing PROW, those "increased street repair and paving costs that result from repeated excavation."[36] This reasonable interpretation relied on the legislative history of Section 253(c) and furthers the intended purpose of this provision without frustrating the oversight role reserved to state and local authorities. However, absent further guidance from the Commission, numerous state and local authorities have imposed compensation schemes that stretch the boundaries of, and often go beyond, the limitations set forth in Section 253(c).

The Council submits that, consistent with its requested clarification, state and local authorities should be permitted to assess fees only if they are demonstrably cost-based. The appropriate costs to factor into fee calculation include administration costs (i.e. intake, processing and review of applications) and costs to maintain PROW (perhaps assessed based on the amount of space on a PROW occupied by a particular provider relative to costs of maintaining PROW as a whole for all users, including vehicles, pedestrians, etc...). To help determine whether state and local authorities are assessing fees that comport with these parameters, the Commission should consider adopting a rebuttable presumption regarding the reasonableness of rates – perhaps by initiating a statistical study of rates around the country and the methods by which the rates were adopted to establish the basis for such a presumption.

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36 *See Classic Telephone, Inc.*, 11 FCC Rcd at 13103.

C. The Commission Should Declare That Fees and Management Activities Are "Competitively Neutral and Nondiscriminatory" Only If, Both on Their Face And in Practice, They Do Not Materially Differ From Fees and Obligations Imposed on Any Other Provider for Similar Access to or Impact on PROW

The Council supports the Mobilitie Petition's request for the Commission to declare "that 'competitively neutral and nondiscriminatory' means charges imposed on a provider for access to rights of way that do not exceed the charges that were imposed on other providers for similar access to rights of way."[37] The Council further agrees that although "fees may legitimately vary where they cover dissimilar deployments, or where one deployment imposes materially greater burdens on the right of way than another," "a locality should … be obligated to explain and justify any variation in its charges by showing why different facilities impose different costs on its management of rights of way."[38] The Council submits that appropriate factors to consider when evaluating if fees and obligations are competitively neutral and nondiscriminatory include: (1) assessing whether fees and obligations differ among applicants in terms of the "value" of the fees and obligations;[39] and (2) determining whether different types of providers are subject to disparate treatment by the state or local authority.[40] If a state or local regulation fails to satisfy

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37 Mobilitie Petition at 32.

38 *Id*.

39 *See Cablevision, Inc. v Public Improvement Comm'n*, 184 F.3d 88 (1st Cir. 1999) (finding that the term "competitively neutral" imposes, at most, negative restriction on local authorities' choices regarding management of their rights of way; hence, the statute does not require local authorities to purposefully seek out opportunities to level telecommunications playing field, but if local authority decides to regulate for its own reasons, Section 253 requires that it do so in way that avoids creating unnecessary competitive inequities among telecommunications providers.).

40 *See, e.g.*, *TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21443 (¶ 108) (1997) (the Commission made clear that local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are likely to be neither competitively neutral nor nondiscriminatory.); *see also TCG N.Y., Inc. v City of White Plains*, 305 F.3d 67 (2d Cir.

these factors, it should presumptively be subject to preemption by the Commission, unless the state or local authority can provide a reasonable explanation for the differences in fees.

D. The Commission Should Declare That a State or Local Regulation Satisfies Section 253(c) Only If the Regulation Is "Publicly Disclosed" Prior to Any Attempt by the State or Local Authority to Enforce It

Section 253(c) preserves state and local government authority to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, *if the compensation required is publicly disclosed by such government*."[41] The plain and ordinary meaning of this provision is that a state or local authority must establish and disclose the compensation it seeks to recover from a telecommunications carrier in advance. Such compensation should be publicly viewable in order for this clause to serve its purpose – transparency. If disclosure after the fact were permitted, this statutory requirement would be reduced to a purely ministerial act, and the "public disclosure" clause of Section 253(c) would be rendered effectively meaningless, in contravention of well-established statutory construction principles. Moreover, an advance public disclosure requirement is consistent with Commission precedent, which makes clear that public disclosure of compensation and other requirements imposed by a state or local regulation is a prerequisite to those regulators invoking Section 253(c) as a defense.[42] Further, public disclosure of what each

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2002), cert. denied, 123 S.Ct. 1582 (2003) (finding that White Plains' five percent gross revenue fee provisions imposed on TCG and other non-incumbent carriers, but not on Verizon, were preempted due to the differential treatment carriers received under these provisions).

41 47 U.S.C. § 253(c) (emphasis added).

42 *See Classic Telephone, Inc.*, 11 FCC Rcd at 13103 ("[S]ection 253 permits State and local governments to impose compensation requirements for the use of the public rights-

PROW user is paying will allow providers to monitor how their payments compare to other providers, and if there is a concern, will both help avoid needless litigation under Section 253(c), and facilitate well-informed complaints where they are necessary. Therefore, the Commission should declare that a state or local regulation may be protected under Section 253(c) only if the regulation is "publicly disclosed" prior to any attempt by the state or local authority to enforce it.

IV. THE COMMISSION SHOULD CLARIFY HOW SECTION 253(c) RELATES TO SECTION 253(a)

Although not expressly raised in the Public Notice or the Mobilitie Petition, this proceeding affords the Commission the important opportunity to provide guidance to the industry as well as state and local regulators regarding the relationship between Section 253(a) and Section 253(c). Specifically, the Commission should clarify whether Section 253(c) should be interpreted to operate solely as a "safe harbor" that protects certain state and local statutes, regulations, and requirements where the FCC or a court finds there has been a violation of Section 253(a), or if Section 253(c) provides a basis for seeking relief from a state or local regulation even if there has been no Section 253(a) violation.

Over the past two decades, courts have reached disparate conclusions on this issue, leading to inconsistent application of the statute across the nation. While some courts have held that Section 253(c) can serve as an independent basis for seeking relief from a state or local regulation,[43] others have interpreted the statute to require a violation of Section 253(a) before

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of-way so long as such compensation is fair and reasonable, competitively neutral, nondiscriminatory, ***and*** is publicly disclosed.") (emphasis added).

43 *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000) (concluding that it is incorrect to say that reading a private right of action into §253(c) "runs counter to the statutory scheme of §253 itself"); *N.J. Payphone Ass'n v. Town of W. N.Y.*, 299 F.3d 235, 241 (3rd Cir. 2002) ("Although Sections 253(b) and (c) are framed as savings clauses, Section 253(d) speaks of 'violation' of (b) suggesting that it must impose some sort of

addressing the question of whether the regulation is nevertheless permissible under Section 253(c).[44] The Commission's previous statements regarding Sections 253(a) and 253(c) have done little to ameliorate this confusion.[45] Such inconsistency and lack of clarity underscores the need for the Commission to interpret the statute.[46] What interpretation is supportable depends in large part of how Section 253(a) is interpreted. The Commission should also consider what

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substantive limitation independent of (a). This also raises the possibility that Section 253(c), which is similarly phrased [to Section 253(b)], contains a parallel limitation.").

44 *See Level 3 Commc'ns*, 477 F.3d 528, 532-33 (concluding that Section 253(c) is an affirmative defense to an established violation of Section 253(a), not a separate cause of action on its own; only after the plaintiff sustains its burden of showing that a city has violated Section 253(a) does the burden of proving that the regulation comes within the safe harbor in Section 253(c) fall on the defendant municipality).

45 *See State of Minnesota (Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way)*, 14 FCC Rcd 21697, 21704 (¶ 11) (1999) ("To determine whether the Agreement violates section 253 of the Act, we must first consider whether the Agreement is subject to section 253. If we find that the Agreement falls within the scope of section 253, we must determine whether the Agreement may prohibit or have the effect of prohibiting the ability of any entity to provide any telecommunications service. If the Agreement has that effect, the Commission must preempt it unless the Agreement comes within the terms of the exceptions Congress carved out in sections 253(b) and (c)."); *see also TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21443 (¶ 101) (1997) ("Parties seeking preemption of a local legal requirement … must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c).").

46 *See Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 99 (1st Cir. 1999) ("One explanation is that Congress intended § 253(c) ... to be a savings clause only. Under this interpretation, § 253(c) could only be used defensively, in the context of a § 253(a) challenge; the statute would simply not apply to local regulations that are not competitively neutral and nondiscriminatory but nonetheless do not constitute prohibitions on entry. Alternatively, the exclusion of § 253(c) from § 253(d) [which provides for FCC preemption] might reflect Congress's selection of a forum for § 253(c) claims, limiting jurisdiction to federal or state courts instead of forcing municipalities with limited resources to defend rights-of-way regulations and fee structures before the FCC in Washington, D.C.... If this interpretation were correct, it would become necessary to decide whether the proper cause of action for a § 253(c) claim is created by § 253(c) itself or arises from some other source.").

interpretation fulfills the purpose of the statute – namely, reducing barriers to deployment while still maintaining an appropriate role for of state and local regulators.[47]

As previously discussed, courts have issued inconsistent statements about the showing required to establish a claim for an alleged violation of Section 253(a).[48] The Council submits that the purpose of Section 253 would be best served by allowing providers to challenge state regulations under a lower evidentiary threshold, and then affording the state or locality the opportunity to defend such regulations using the protections set forth in Section 253(c).[49] If, however, the Commission determines that Section 253(a) claims are subject to a higher evidentiary standard, similar to the view taken by the Eighth and Ninth Circuits, then the Commission should interpret Section 253(c) as an independent basis for seeking relief from a state or local regulation, even absent an allegation or finding of a Section 253(a) violation. If in practice, a state can enact a regulation which severely hinders a provider's ability to access PROW, and such regulation is essentially presumed valid because a challenging party must make a showing of "actual or effective prohibition" to establish a Section 253(a) claim, there would be no apparent need for the "savings clauses" set forth in Section 253(c). Moreover, allowing state

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47 Indeed, Chairman Pai was clear when he introduced his Digital Empowerment Agenda last fall that "where states or localities are imposing fees that are not 'fair and reasonable' for access to local rights of way, the FCC should preempt them. Where local ordinances erect barriers to broadband deployment (especially as applied to new entrants), the FCC should eliminate them. And where local governments are not transparent about their application processes, the FCC should require some sunlight. These processes need to be public and streamlined." Pai Digital Empowerment Remarks.

48 *See* Section II, *supra*.

49 However, the Commission also should declare that if a regulation that is the subject of the claim imposes an outright prohibition on the provision of telecommunications service, it is per se a violation and cannot be saved. Such a regulation would directly contravene the purpose of the statute, and therefore Section 253(c) should not be available to a state or local regulator as a defense to such a Section 253(a) violation.

and local regulators to rely on both a high evidentiary standard to establish a Section 253(a) violation and the corresponding availability of Section 253(c) only as a safe harbor would undermine the purpose of Section 253 by permitting states to erect barriers to entry and then offering them a defense if challenged.

CONCLUSION

For all of the above-stated reasons, the Council respectfully requests that the Commission issue a declaratory ruling regarding the appropriate interpretation and implementation of Section 253 of the Communications Act in order to achieve the objective of reducing barriers to entry for telecommunications services.

Respectfully Submitted,

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